Supreme Court, U.S.
FILED

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No. ____

In The

Supreme Court of the United States

October Term, 1996

THE STATE OF TEXAS,

Petitioner,

vs.

FREDA S. MOWBRAY A/K/A SUSIE MOWBRAY,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Texas Court of Criminal Appeals improperly apply the federal rule of decision enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963), which rule has no prejudice element and applies only to instances involving the complete nondisclosure of exculpatory evidence, to this delayed disclosure situation where the defense discovered the exculpatory evidence before the trial concluded?

2. Did the Texas Court of Criminal Appeals improperly interpret the Fourteenth Amendment and the decision in *Brady v. Maryland*, 373 U.S. 83 (1963) to require reversal of the conviction where the prosecution disclosed the exculpatory information to the defense ten days before the start of trial and no prejudice to the defense was alleged or proven by any delayed disclosure?

3. Did the Texas Court of Criminal Appeals incorrectly extend the rule enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963) beyond its stated disclosure requirement, by additionally requiring the State of Texas to present testimony detrimental to its case, simply because the prosecutor advised the defense attorney that he intended to use a certain witness who possessed some exculpatory information, but then ultimately elected not to call that witness at trial, where the State of Texas had already disclosed the favorable nature of the witness' testimony to the defense so as to allow the defense to take advantage of it, by subpoenaing the witness or otherwise?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. THE COURT OF CRIMINAL APPEALS OF TEXAS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH DECISIONS FROM EVERY CIRCUIT OF THE UNITED STATES COURT OF APPEALS. THIS IMPORTANT QUESTION HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT 6

A. The Court of Criminal Appeals did not consider whether Mowbray's defense was prejudiced by the delay 8

B. By not including the prejudice element in its analysis, the Court of Criminal Appeals of Texas has strayed from the path paved by our federal circuit courts for resolving delayed disclosure issues, and therefore, is in need of guidance from this Court 13

TABLE OF CONTENTS – Continued

Page

II. THE COURT OF CRIMINAL APPEALS OF TEXAS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH A DECISION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN *LAMB V. UNITED STATES*, 414 F.2D 250 (9TH CIR. 1969). THIS IMPORTANT QUESTION HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT..... 15

A. The Court of Criminal Appeals of Texas has improperly expanded the scope of the *Brady* rule beyond its simple disclosure requirement, to the point of additionally requiring the prosecution to present evidence detrimental to its case..... 15

B. The holding of the Court of Criminal Appeals of Texas conflicts with the Ninth Circuit's decision in *Lamb v. United States*, 414 F.2d 250 (9th Cir. 1969), as well as with at least one decision from an intermediate state court..... 17

III. SUMMARY..... 19

CONCLUSION..... 20

APPENDIX

Majority opinion of the Court of Criminal Appeals of Texas.....App. 1

Dissenting Opinion of the Court of Criminal Appeals of Texas.....App. 14

Dissenting Opinion of the Court of Criminal Appeals of Texas.....App. 17

TABLE OF CONTENTS – Continued

Page

Trial court's Findings of Fact and Conclusions of Law.....App. 23

Court of Criminal Appeals Orders denying State's Motions for Rehearing .....App. 35

Excerpts from State's Objections to Trial Court's Findings of Fact and Conclusions of Law.....App. 36

Excerpts from State's Motion for Rehearing...App. 38

TABLE OF AUTHORITIES

Page

CASES

Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995) 16

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) ..... *passim*

Flores v. State, 487 S.W.2d 122 (Tex. Crim. App. 1972) 13

Giglio v. United States, 405 U.S. 150 (1972) 7

Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) 7, 13

Lamb v. United States, 414 F.2d 250 (9th Cir. 1969) 10, 15, 17, 18

McGeshick v. Fiedler, 3 F.3d 1083 (7th Cir. 1993) 8

Ex parte Mowbray, ___ S.W.2d ___ (Tex. Crim. App. 1996) 5

Mowbray v. State, 788 S.W.2d 658 (Tex. App. – Corpus Christi 1990, pet. ref'd), *cert. denied*, 498 U.S. 1101, 111 S.Ct. 999, 112 L.Ed.2d 1082 (1991) ..2, 10

Patler v. Slayton, 503 F.2d 472 (4th Cir. 1974) 8

Penrod Drilling Corp. v. Williams, 868 S.W.2d 294 (Tex. 1993) 13

People v. Williams, 81 Ill.App.3d 122, 36 Ill. Dec. 400, 400 N.E.2d 980 (3d Dist. 1980) 18

Reiger v. Christensen, 789 F.2d 1425 (9th Cir. 1986) 9

Smith v. Secretary of N.M. Dep't of Corrections, 50 F.3d 801 (10th Cir. 1995) 16

Ex parte Stuart, 653 S.W.2d 13 (Tex. Crim. App. 1983) 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Adams, 834 F.2d 632 (7th Cir. 1987), *cert. denied*, 484 U.S. 1046, 108 S.Ct. 783, 98 L.Ed.2d 869 (1988) 9

United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) 7, 14

United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) 6, 7, 14, 16

United States v. Aubin, 87 F.3d 141 (5th Cir. 1996) 16

United States v. Bishop, 890 F.2d 212 (10th Cir. 1989), *cert. denied*, 493 U.S. 1092, 110 S.Ct. 1164, 107 L.Ed.2d 1067 (1990) 11

United States v. Bueno-Sierra, 99 F.3d 375 (11th Cir. 1996), *cert. denied sub nom. Sanchez v. United States*, ___ U.S. ___, 117 S.Ct. 1119, 137 L.Ed.2d 139 (1997), and *cert. denied*, ___ U.S. ___, ___ S.Ct. ___, 65 U.S.L.W. 3665 (1997) 7, 9

United States v. Bencs, 28 F.3d 555 (6th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 915 (1995) 8, 9, 14

United States v. Compagnuolo, 592 F.2d 852 (5th Cir. 1979) 16

United States v. Dean, 55 F.3d 640 (D.C. Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1288 (1996) ..8, 11

United States v. Diaz, 922 F.2d 998 (2nd Cir. 1990), *cert. denied*, 500 U.S. 925 (1991) 8, 14

United States v. Holloway, 740 F.2d 1373 (6th Cir.), *cert. denied*, 469 U.S. 1021 (1984) 9

United States v. Jones, 101 F.3d 1263 (8th Cir. 1996), *cert. denied sub nom. Barnes v. United States*, ___ U.S. ___, 65 U.S.L.W. 3665 (1997) 7

TABLE OF AUTHORITIES – Continued

Page

United States v. Joselyn, 99 F.3d 1182 (1st Cir. 1996), *cert. denied sub nom. Bill Myer v. United States*, ___ U.S. ___, 117 S.Ct. 959 (1997) 7, 8

United States v. McKinney, 758 F.2d 1036 (5th Cir. 1985).....8, 14

United States v. Malone, 49 F.3d 393 (8th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 208 (1995) 16

United States v. Maniktala, 934 F.2d 25 (2nd Cir. 1991)..... 16

United States v. Neal, 27 F.3d 1035 (5th Cir.), *cert. denied sub nom. Joyce v. United States*, ___ U.S. ___, 115 S.Ct. 530 (1994), and *cert. denied*, ___ U.S. ___, 115 S.Ct. 1165 (1995) 8

United States v. Higgs, 713 F.2d 39 (3rd Cir. 1983), *cert. denied sub nom. Kemp v. United States*, 464 U.S. 1048 (1984) 8

United States v. Parks, 100 F.3d 1300 (7th Cir. 1996) 15

United States v. Perdomo, 929 F.2d 967 (3rd Cir. 1991)..... 16

United States v. Perdozzi, 878 F.2d 1526 (1st Cir. 1989)..... 16

United States v. Ramirez, 810 F.2d 1338 (5th Cir.), *cert. denied*, 484 U.S. 844, *cert. denied sub nom. Alegria-Valencia v. United States*, 481 U.S. 908, and *cert. denied sub nom. Rodrigues v. United States*, 482 U.S. 908 (1987) 9

United States v. Shelton, 588 F.2d 1242 (9th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979)..... 14

United States v. Starusko, 729 F.2d 256 (3rd Cir. 1984)..... 16

TABLE OF AUTHORITIES – Continued

Page

United States v. Watson, 76 F.3d 4 (1st Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1889 (1996) 9, 14

United States v. Woodley, 9 F.3d 774 (9th Cir. 1993) 8

United States v. Warhop, 732 F.2d 775 (10th Cir. 1984) 11

United States v. Wilson, 901 F.2d 378 (4th Cir. 1990) 16

United States v. Young, 45 F.3d 1405 (10th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2633 (1995) 8, 14

United States v. Zackson, 6 F.3d 911 (2nd Cir. 1993) 16

United States v. Zambrana, 841 F.2d 1320 (7th Cir. 1988) 14

West v. Johnson, 92 F.3d 1385 (5th Cir. 1996), *petition for cert. filed* (Dec. 23, 1996) 15

Wood v. Bartholomew, ___ U.S. ___, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995) 7

CONSTITUTION:

U.S. CONST. amend. XIV, § 1 .....2, 5, 14, 15

PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The State of Texas, Petitioner herein,[1] by and through Yolanda de Leon, the Criminal District Attorney of Cameron County, Texas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Texas in this murder case.

OPINIONS BELOW

The majority and two dissenting opinions of the Court of Criminal Appeals of Texas are not yet published in S.W.2d. They are reproduced in the Appendix at A-1. The trial court's findings of fact and conclusions of law are unpublished and are reproduced in the Appendix at A-2.

JURISDICTION

The Court of Criminal Appeals of Texas rendered its split 5-3 decision on December 18, 1996. The State, by and through the Criminal District Attorney of Cameron County, Texas, timely filed a motion for rehearing on December 31, 1996. The State filed another motion for rehearing on January 17, 1997 by and through its State Prosecuting Attorney. The Court of Criminal Appeals

[1] For clarity, the Petitioner is referred to as "the State," and the Respondent is referred to as "Mowbray."

subsequently denied both motions for rehearing on February 12, 1997 without written opinion. Two judges dissented to the denial. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

A jury found Mowbray guilty of the September 16, 1987 murder of her husband, Bill Mowbray, and assessed her punishment at confinement for Life with a $10,000.00 fine. The Court of Appeals for the Thirteenth Judicial District of Texas affirmed the conviction in a published decision. *Mowbray v. State*, 788 S.W.2d 658 (Tex. App. – Corpus Christi 1990, pet. ref'd), *cert. denied*, 498 U.S. 1101 (1991).

Mowbray filed her Application for Writ of Habeas Corpus on April 12, 1995 in which she raised the following three claims: (1) that she is "actually innocent" of

murder, (2) that an expert for the State knowingly gave false testimony that the State knew was false, and (3) that her team of trial attorneys[2] were constitutionally deficient for failing to investigate the original findings of an expert witness. (WHC Trans. pp.1-118) The trial court initially determined there were no controverted previously unresolved facts material to the legality of Mowbray's confinement, and ordered the court clerk to forward the application to the Court of Criminal Appeals for their consideration. (WHC Trans. p.158) The Court of Criminal Appeals, however, remanded the case specifically to develop additional facts as to the three issues raised in the Application. (WHC 2nd Supp. Trans. pp.1-2) After an evidentiary hearing on those three issues (WHC 2nd Supp. Trans. p.3), the trial judge ruled that Mowbray had not proven an entitlement to relief on those grounds, but nonetheless concluded, *sua sponte*, that she was entitled to a new trial due to certain *Brady*[3] violations.[4] (WHC 2nd Supp. Trans. pp.54-66)

In a nutshell, the trial court concluded that Herbert Leon MacDonell, a retained blood spatter expert for the State who ultimately was not called to testify at trial, held

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[2] Mowbray was represented at trial by three attorneys: Abel Toscano, Dale Robertson and Gerald Burnett. (WHC SF Vol. I/P.174/L.22-25; P.175/L.1-11)

[3] From *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[4] Mowbray did not raise any kind of a *Brady* claim in her Application. Accordingly, the State was never placed on notice that it was litigating any such issues at the evidentiary hearing. The trial court simply granted Mowbray relief, *sua sponte*, without giving the State any opportunity to prepare a defense to its *Brady* conclusions.

exculpatory information concerning the alleged absence of blood on Mowbray's nightgown, and that the State committed a *Brady*/due process violation by providing Mowbray's counsel with a copy of MacDonell's written report containing these allegedly exculpatory findings only ten days prior to trial. The court also determined that prosecutors further deliberately suppressed MacDonell's testimony as a whole, even after supplying the defense with MacDonell's report, by causing Mowbray's defense team to believe MacDonell would testify as a State's witness, and therefore, be available at trial for cross-examination.[5] In other words, the trial court found that State prosecutors committed another *Brady*/due process violation simply by failing to follow through with a pre-trial statement to defense counsel that the State intended to call MacDonell at trial, notwithstanding the fact that the State provided his allegedly exculpatory findings to the defense in the form of his written report ten days prior to trial.

The State filed written objections to the trial court's findings, arguing that no *Brady* violations occurred because: (1) there was no suppression, (2) the defense failed to request a continuance or claim suppression at trial, (3) the defense made a strategic decision not to use MacDonell as a defense witness, and (4) the defense could have procured MacDonell's testimony through the exercise of due diligence. (WHC 3rd Supp. Trans. pp.5-14)

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[5] Please refer to the trial court's Finding of Fact No. 25. (WHC 2nd Supp. Trans. p.62, p.65)

A majority of the Court of Criminal Appeals nonetheless accepted the trial court's factual findings and legal conclusions in a published opinion, set aside Mowbray's conviction, and ordered her returned to Cameron County, Texas to answer the indictment. *Ex parte Mowbray*, ___ S.W.2d ___ (Tex. Crim. App. 1996). Their decision, however, drew three of the eight judges participating to dissent and publish two separate dissenting opinions. Judge McCormick stated the following in his dissent:

> *"I must respectfully dissent. In this case, the majority grants relief on this eight-year-old conviction by holding applicant's due process rights under the Fourteenth Amendment to the United States Constitution were violated when the State "suppressed" MacDonnell's (sic) report by furnishing it to applicant about two weeks before her 1988 trial began! Just to state the Court's holding is to refute it. The Court's holding as to this aspect of the case is absurd and represents another inane exercise in judicial activism – i.e., finding so called "rights" in the United States Constitution that just do not exist."*

Ex parte Mowbray, ___ S.W.2d ___ (Tex. Crim. App. 1996) (McCormick, P.J., dissenting) (footnote omitted).

The State and State Prosecuting Attorney each filed separate and timely Motions for Rehearing arguing that no *Brady* violation occurred because no finding was made and no evidence was presented to indicate that Mowbray suffered any prejudice directly attributable to the prosecution's alleged delay in tendering MacDonell's report to the defense. The State also claimed that *Brady v. Maryland* does not require prosecutors to actually call every witness possibly having knowledge of exculpatory information to testify at trial simply because they listed those

persons' names on the State's subpoena list, and that *Brady* only requires the State to disclose exculpatory material to the defense prior to trial. *See, e.g., United States v. Bagley*, 473 U.S. 667, 675 (1985) (the *Brady* rule is not intended to displace the adversary system as the primary means by which the truth is uncovered).

The Court of Criminal Appeals denied the State and State Prosecuting Attorney's motions for rehearing without opinion. Two judges noted their dissent. The court stayed issuance of its mandate for 90 days, pending disposition of this petition.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF CRIMINAL APPEALS OF TEXAS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH DECISIONS FROM EVERY CIRCUIT OF THE UNITED STATES COURT OF APPEALS. THIS IMPORTANT QUESTION HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The trial court found, and the Court of Criminal Appeals of Texas agreed, that Mowbray's defense counsel received MacDonell's report approximately ten days prior to trial. (WHC 2nd Supp. Trans. p.61) The State, therefore, respectfully submits that it did not *"suppress"* the report, contrary to the trial court's findings and the appellate court's majority opinion. At best, the only issue that could possibly be involved is one of delayed disclosure.

While this Court has addressed several instances involving the complete nondisclosure of exculpatory evidence[6], it has never authored an opinion on the tardy disclosure issue, and therefore, has not stated whether or under what circumstances such a situation may violate the *Brady* rule. There is, however, some *dicta* from this Court indicating whether a late disclosure of exculpatory material falls within *Brady's* ambit. In *United States v. Agurs*, 427 U.S. 97, 103 (1976), this Court stated: "The rule of *Brady v. Maryland* arguably applies in three quite different situations. Each involves the discovery, **after trial** of information which had been known to the prosecution but unknown to the defense." (Emphasis added).

Nonetheless, the rule that has emerged from every federal circuit is that a tardy disclosure situation may in some instances implicate *Brady* concerns, but only where the defendant has been so prejudiced as a direct result of the delay that he was prevented from receiving a fair trial. *See, e.g., United States v. Jones*, 101 F.3d 1263, 1272 (8th Cir. 1996)[7]; *United States v. Bueno-Sierra*, 99 F.3d 375, 379 (11th Cir. 1996)[8]; *United States v. Joselyn*, 99 F.3d 1182,

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[6] *See, e.g., Wood v. Bartholomew*, ___ U.S. ___, 116 S.Ct. 7 (1995); *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976); *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963).

[7] *Cert. denied sub nom. Barnes v. United States*, ___ U.S. ___, 65 U.S.L.W. 3665 (1997).

[8] *Cert. denied sub nom. Sanchez v. United States*, ___ U.S. ___, 117 S.Ct. 1119, *and cert. denied*, ___ U.S. ___, ___ S.Ct. ___, 65 U.S.L.W. 3665 (1997).

1196 (1st Cir. 1996)[9]; *United States v. Dean*, 55 F.3d 640, 663 (D.C. Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1288 (1996); *United States v. Young*, 45 F.3d 1405, 1408-09 (10th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2633 (1995); *United States v. Bencs*, 28 F.3d 555, 560-61 (6th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 915 (1995); *United States v. Neal*, 27 F.3d 1035, 1050 (5th Cir. 1994)[10]; *McGeshick v. Fiedler*, 3 F.3d 1083, 1086 (7th Cir. 1993); *United States v. Woodley*, 9 F.3d 774, 777 (9th Cir. 1993); *United States v. Diaz*, 922 F.2d 998, 1007 (2nd Cir. 1990), *cert. denied*, 500 U.S. 925 (1991); *United States v. Higgs*, 713 F.2d 39, 44 (3rd Cir. 1983)[11]; *Patler v. Slayton*, 503 F.2d 472, 472-80 (4th Cir. 1974). If the defendant received the material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early as it should have been. *See, e.g., United States v. McKinney*, 758 F.2d 1036, 1050 (5th Cir. 1985).

A. The Court of Criminal Appeals did not consider whether Mowbray's defense was prejudiced by the delay.

The majority of Court of Criminal Appeals held that the State committed a *Brady* violation by providing Mowbray's defense team with a copy of MacDonell's

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[9] *Cert. denied sub nom. BillMyer v. United States*, ___ U.S. ___, 117 S.Ct. 959 (1997).

[10] *Cert. denied sub nom. Joyce v. United States*, ___ U.S. ___, 115 S.Ct. 530 (1994), and *cert. denied*, ___ U.S. ___, 115 S.Ct. 1165 (1995).

[11] *Cert. denied sub nom. Kemp. v. United States*, 464 U.S. 1048 (1984).

written report only ten days prior to trial. Specifically, the court determined that the State "suppressed" the report by the late disclosure, that it was favorable evidence supporting Mowbray's suicide theory, and that it was material to Mowbray's guilt. The court, however, completely failed to consider whether Mowbray's defense was prejudiced as a result of the delay.

Mowbray's counsel received MacDonell's report approximately ten days prior to trial. (WHC 2nd Supp. Trans. p.61) No finding was made, and no evidence was presented at the evidentiary hearing, that ten days was an insufficient time for the Mowbray defense team to subpoena MacDonell to trial after receiving his report, had they been so inclined. Even if one were to assume that ten days was insufficient, no findings were made and no evidence was presented that prevented or excused Mowbray from requesting a continuance. A defendant suffers no material prejudice to her defense where, as here, she fails to request a continuance. *See United States v. Watson*, 76 F.3d 4, 8 (1st Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1889 (1996); *United States v. Adams*, 834 F.2d 632, 635 (7th Cir. 1987), *cert. denied*, 484 U.S. 1046 (1988); *United States v. Ramirez*, 810 F.2d 1338, 1343 (5th Cir. 1987)[12]; *Reiger v. Christensen*, 789 F.2d 1425, 1432 (9th Cir. 1986); *United States v. Holloway*, 740 F.2d 1373, 1381 (6th Cir.), *cert. denied*, 469 U.S. 1021 (1984); *see also United States v. Bueno-Sierra*, 99 F.3d at 379-80; *and United States v.*

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[12] *Cert. denied*, 484 U.S. 844, *cert. denied sub nom. Alegria-Valencia v. United States*, 481 U.S. 908, and *cert. denied sub nom. Rodrigues v. United States*, 482 U.S. 908 (1987).

Bencs, 28 F.3d at 561 (continuance cures any prejudice resulting from tardy disclosure).

The same rationale applies to the Court of Criminal Appeals' conclusion that the prosecutors suppressed MacDonell's exculpatory testimony by causing the defense to believe that the State would call him to testify at trial. The State rested its case on June 1, 1988. (SF Vol. XV/P.951/L.23-25) The defense, however, did not rest until June 7, 1988. (SF Vol. XIX/P.1763/L.18-20) Again, no finding was made, and no evidence was presented at the evidentiary hearing, that six days was an insufficient time for the Mowbray defense team to subpoena MacDonell to trial as a defense witness after learning that prosecutors had rested their case without calling him. *See Lamb v. United States*, 414 F.2d 250, 252 (9th Cir. 1969) (failure to request continuance after learning that prosecutor had released exculpatory witness from subpoena ruined defendant's suppression claim).

Not only did Mowbray fail to request a continuance due to either MacDonell's absence or his allegedly late report, she also failed to address either issue before trial, during trial, in her motion for new trial (Trans. pp.308-357), on direct appeal, *see Mowbray v. State*, 788 S.W.2d at 658-672, or even in her application for writ of habeas corpus. (WHC Trans. pp.1-118) Rather, it was the habeas judge who first raised the issues, *sua sponte*, more than seven years after her conviction in its findings of fact and conclusions of law. (WHC 2nd Supp. Trans. pp.54-66)

Additionally, a defendant suffers no material prejudice to her defense as the result of a tardy disclosure,

where, as here, her attorney makes a tactical decision not to utilize the evidence after discovering it. *United States v. Dean*, 55 F.3d at 664-65; *United States v. Bishop*, 890 F.2d 212, 219 (10th Cir. 1989), *cert. denied*, 493 U.S. 1092 (1990); *United States v. Warhop*, 732 F.2d 775, 777 (10th Cir. 1984). The Court of Criminal Appeals completely failed to consider the curative effect of the undisputed testimony of Mowbray's lead counsel, Abel Toscano, concerning his tactical reasons for not calling MacDonell as a defense witness.

Toscano testified at the evidentiary hearing that after receiving MacDonell's report, he did not find it to be helpful and decided not to call MacDonell as a witness after consulting with the rest of the defense team, his client, and his retained blood spatter expert, Tom Bevel. (WHC SF Vol. I/P.200/L.3-25; P.201/L.1-22; P.206/L.11-25; P.207/L.1) Toscano also offered a plethora of other tactical reasons for not wanting to call MacDonell as a witness, all of which were unrebutted by any other evidence.

First, Toscano was concerned that MacDonell's report did not state that the victim, Bill Mowbray, committed suicide (WHC SF Vol. I/P.201/L.23-25; P.202/L.1-3), and he did not want to confuse the jury with differing blood spatter theories from Bevel and MacDonell. (WHC SF Vol. I/P.201/L.7-22) He found MacDonell's report to be vague and subject to more than one interpretation. (WHC SF Vol. I/P.199/L.14-20) He was also concerned that MacDonell prepared his report without a full awareness of all of the facts, since his report incorrectly stated that it is *"very unlikely"* that Applicant's gown was near the wound at the time of the fatal blast (WHC SF Vol.

I/P.202/5-12; P.207/2-23), which statement was inconsistent with his client's theory of the case that Applicant was wearing the gown and reaching for the victim's elbow at the time of the blast (WHC SF Vol. I/P.110/L.14-125; P.111/L.1-3), and contradicted the evidence of gunshot residue found on Applicant's right sleeve. (WHC SF Vol. I/P.111/L.4-17) Toscano also testified that he already had retained Tom Bevel as a blood spatter expert, and therefore, had no need for MacDonell's cumulative and superfluous comments. (WHC SF Vol. I/P.208/L.16-24; P.212/L.16-18) Toscano also believed that it would be dangerous to call a State's witness like MacDonell to the stand for fear that such a witness might (and probably would) turn against him. (P.207/L.18-23)

Moreover, Toscano never at any time stated that he would have called MacDonell to testify as a defense witness had he known of the prosecutors' plan not to call him as a State's witness. Accordingly, there is no basis to conclude that Mowbray was prejudiced by any delay in receiving MacDonell's report. Rather, Toscano's undisputed testimony shows that he made a conscious tactical decision to forego MacDonell as a defense witness for a number of reasons. (WHC SF Vol. I/P.201/L.2-22) The Court of Criminal Appeals, however, declined to consider the prejudice element in its analysis of this case, and therefore, did not acknowledge the significance of either Toscano's testimony or his failure to raise the delayed disclosure issues at trial.

B. By not including the prejudice element in its analysis, the Court of Criminal Appeals of Texas has strayed from the path paved by our federal circuit courts for resolving delayed disclosure issues, and therefore, is in need of guidance from this Court.

The Court of Criminal Appeals declined to consider the prejudice element in its published analysis of this case, notwithstanding the clear abundance of caselaw from the federal circuits imposing it. The highest courts in Texas, however, have determined that they are not obligated to follow any federal court other than the United States Supreme Court in determining an appropriate federal rule of decision. *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294 (Tex. 1993); *Ex parte Stuart*, 653 S.W.2d 13, 14-15 (Tex. Crim. App. 1983); *Flores v. State*, 487 S.W.2d 122, 126 (Tex. Crim. App. 1972). As this Court has never confronted the delayed disclosure issue, the Texas courts are presently left free to fashion their own rules. The State submits they need some guidance, as their split decision reflects.

This Court has previously addressed only situations where favorable evidence was discovered after trial, rather than before or during trial. *See, e.g., Kyles v. Whitley*, 514 U.S. 419 (1995); *Brady v. Maryland*, 373 U.S. 83 (1963). The rule from these cases is that to establish a *Brady* claim, a habeas petitioner must demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the petitioner, and (3) the evidence was material. *Brady*, 373 U.S. at 87.

The Court of Criminal Appeals, in its analysis, incorrectly applied these same three steps to find a violation of

the Due Process Clause of the Fourteenth Amendment. As its opinion reflects, the majority determined that the State *"suppressed"* MacDonell's report by tendering it to the defense ten days before trial. It also found the information in the report was favorable, as well as material. Materiality, however, concerns only the issues of guilt or punishment, and not the defendant's ability to prepare for trial. *See United States v. Agurs*, 427 U.S. at 112 n.20 (rejected claim that duty to disclose hinges on usefulness of the material to pretrial preparation); *see also United States v. Bencs*, 28 F.3d, at 560. A *Brady* violation will require reversal only where there is a reasonable probability that, had the evidence been disclosed, the result would have been different. *United States v. Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.); *id.*, at 685, 105 S.Ct., at 3385 (White, J. concurring in part and concurring in judgment). *Brady*, therefore, does not apply to a delayed disclosure of exculpatory information, but only to a complete failure to disclose. *United States v. Bencs*, 28 F.3d at 560. Delay only implicates *Brady* concerns when the delay itself causes prejudice – as shown by the huge number of decisions from the federal circuit courts. *See, e.g., United States v. Watson*, 76 F.3d at 8; *United States v. Young*, 45 F.3d at 1408; *United States v. Bencs*, 28 F.3d at 560; *United States v. Diaz*, 922 F.2d at 1007; *United States v. Beale*, 921 F.2d at 1426; *United States v. Zambrana*, 841 F.2d 1320, 1340 (7th Cir. 1988); *United States v. McKinney*, 758 F.2d at 1049-50; *United States v. Shelton*, 588 F.2d 1242, 1247 (9th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979).

By failing to consider the prejudice element, the Texas Court of Criminal Appeals has employed a rule of decision in this delayed disclosure situation that applies

only to nondisclosure cases. The State submits the Texas high court is in need of some guidance and direction.

II. THE COURT OF CRIMINAL APPEALS OF TEXAS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH A DECISION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN *LAMB V. UNITED STATES*, 414 F.2D 250 (9TH CIR. 1969). THIS IMPORTANT QUESTION HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The Court of Criminal Appeals of Texas has improperly expanded the scope of the *Brady* rule beyond its simple disclosure requirement, to the point of additionally requiring the prosecution to present evidence detrimental to its case.

The Court of Criminal Appeals held that prosecutors *"suppressed"* MacDonell's testimony as a whole, even after providing the defense with his expert report containing his allegedly exculpatory findings, by somehow representing to the defense that he would testify at trial as a State's witness. The court cited *Brady v. Maryland*, 373 U.S. 83 (1963), and the Due Process Clause of the Fourteenth Amendment as authority. The State submits the holding is incorrect.

First, the State is not required under *Brady*, to furnish a defendant with exculpatory evidence that is fully available to the defendant or that could be obtained through reasonable diligence. *United States v. Parks*, 100 F.3d 1300, 1307 (7th Cir. 1996); *West v. Johnson*, 92 F.3d 1385, 1399

(5th Cir. 1996), *petition for cert. filed* (Dec. 23, 1996); *Baxter v. Thomas*, 45 F.3d 1501, 1507 (11th Cir. 1995); *United States v. Zackson*, 6 F.3d 911, 918-19 (2nd Cir. 1993); *United States v. Perdomo*, 929 F.2d 967, 973 (3rd Cir. 1991); *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990); *United States v. Perdozzi*, 878 F.2d 1526, 1529-30 (1st Cir. 1989). All Mowbray had to do to ensure MacDonell's appearance at trial was exercise due diligence and subpoena the man herself, or request a continuance if she believed there was insufficient time to do so, rather than remaining mute about it throughout her trial – and for eight years thereafter.

Second, the Court of Criminal Appeals refers to no authority requiring the State to present testimony injurious to its case – and pay an expert witness his fee for doing it. Nothing within the *Brady* opinion requires it. Rather, *Brady* is a rule of fairness and minimum prosecutorial obligation. *Smith v. Secretary of N.M. Dep't of Corrections*, 50 F.3d 801, 822 (10th Cir. 1995); *United States v. Malone*, 49 F.3d 393, 396 (8th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 208 (1995); *United States v. Maniktala*, 934 F.2d 25, 28 (2nd Cir. 1991); *United States v. Starusko*, 729 F.2d 256, 262 (3rd Cir. 1984); *United States v. Compagnuolo*, 592 F.2d 852, 860 (5th Cir. 1979). It does not require the prosecution to conduct a defendant's investigation or to assist in the presentation of the defense's case. *United States v. Aubin*, 87 F.3d 141, 148 (5th Cir. 1996). Its purpose is to ensure that a miscarriage of justice does not occur, not to displace the adversary system as the primary means by which the truth is uncovered. *United States v. Bagley*, 473 U.S. 667, 675 (1985).

The State submits it fully complied with *Brady* when it provided the defense with MacDonell's expert report containing his allegedly exculpatory findings approximately ten days prior to trial. The defense, after receiving that information, could have subpoenaed MacDonell as a defense witness. As no exculpatory information was concealed from the defense, the State submits the Court of Criminal Appeals improperly used the *Brady* rationale to lay blame on the prosecution for Mowbray's decision not to call MacDonell to testify at trial as a defense witness.

B. The holding of the Court of Criminal Appeals of Texas conflicts with the Ninth Circuit's decision in *Lamb v. United States*, 414 F.2d 250 (9th Cir. 1969), as well as with at least one decision from an intermediate state court.

Although caselaw directly on point is scant, the United States Court of Appeals for the Ninth Circuit rejected an almost identical claim in *Lamb v. United States*, 414 F.2d 250 (9th Cir. 1969). There, the defendant argued that the government had assured defense counsel prior to trial that Mrs. Charles Smith, a certain witness possessing some information favorable to the defense, would testify as a government witness, and that the government suppressed Mrs. Smith's testimony by later releasing her from her subpoena. *Id.*, at 251-252. The Ninth Circuit ruled the claim was *"groundless"* for the following reasons: (1) the record did not show that the State "assured" defense counsel that Mrs. Smith would testify, (2) the favorable information possessed by Mrs. Smith was not concealed from the defense, and (3) the defense failed to

request a continuance after learning that the government had released Mrs. Smith from her subpoena. *Id.*, at 252.

An intermediate appellate court in Illinois also rejected a very similar claim in *People v. Williams*, 81 Ill.App.3d 122, 36 Ill.Dec. 400, 400 N.E.2d 980 (3d Dist. 1980). There, the prosecutor answered a discovery request by listing C. Stephen Rogers as a person the State intended to call as a witness. *Williams*, 400 N.E.2d at 981. Mr. Rogers apparently held information concerning the defendant's blood on the bedsheets that supported his self-defense theory. *Id.* On the first day of trial, however, the State amended its witness list, thereby excluding Mr. Rogers as a State's witness. *Id.*, at 982. The defendant then filed a motion to compel the State to produce Rogers as a witness, which the trial court denied. *Id.* After his conviction for aggravated battery, he appealed claiming that the State had violated the *Brady* rule by failing to produce Mr. Rogers at trial. The appellate court, however, disagreed because the defendant: (1) cited no authority that required the State to present evidence damaging to its case, (2) was aware of the favorable information held by Mr. Rogers, and could have subpoenaed him as a defense witness, and (3) failed to move for a continuance in order to secure Mr. Rogers' presence at trial. *Id.*, at 982-83.

The opinion of the Court of Criminal Appeals in this case is unprecedented and clearly conflicts with the Ninth Circuit's decision in *Lamb*, as well as with at least one other state court opinion. *See Williams*, 400 N.E.2d at 980. These decisions indicate that the Texas high court has misapplied the *Brady* rule to the point of chilling the adversary process by requiring the prosecution to actually present a portion of the defendant's case for her.

Granting review would enable the Court to clarify the law and resolve the conflicts.

III. SUMMARY

The Court of Criminal Appeals of Texas has boldly extended the *Brady* rule far beyond its intended application. According to the Texas high court, prosecutors must present testimony injurious to its case if they ever in any way represented to the defense that they intended to use that exculpatory witness – even if the State had already disclosed the favorable nature of the witness' testimony to the defense so as to allow the defense to take advantage of it, by subpoening the witness or otherwise. The decision to so broaden the *Brady* rule is totally unprecedented and unsupported by existing law.

Nor is there anything in the Court of Criminal Appeals' opinion or the record to suggest that Mowbray was prejudiced by any delayed disclosure of either MacDonell, or his report. The Texas high court did not even consider the prejudice element because it incorrectly applied a rule of decision applicable only to situations involving the complete nondisclosure of exculpatory evidence. The published decision runs contrary to the rule in every federal circuit that places the focus of any delayed disclosure claim on whether the defense was prejudiced by the delay. This Court should grant review so as to clarify these issues.

CONCLUSION

For the foregoing reasons, the State of Texas respectfully requests that the petition for writ of certiorari be granted. The Court may wish to consider summary reversal.

Respectfully submitted,

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APPENDIX

Ex parte Mowbray, ___ S.W.2d ___
(Tex.Crim.App. 1996)

EX PARTE FREDA S. MOWBRAY A/K/A SUSIE MOWBRAY

No. 72,624

Court of Criminal Appeals of Texas

En banc.

December 18, 1996, Delivered

As Corrected February 13, 1997

OPINION

BAIRD, Judge.

Applicant was convicted of murder and sentenced to confinement for Life with a $10,000.00 fine. The Court of Appeals affirmed. *Mowbray v. State*, 788 S.W.2d 658 (Tex.App. – Corpus Christi 1990). Her habeas application contends: she is actually innocent of murder; the State's expert knowingly gave false and misleading testimony; the State knowingly used false testimony; and, she suffered ineffective assistance of counsel at trial. The habeas judge entered findings of fact and conclusions of law, recommending that we grant a new trial. We will grant relief.

I.

The evidence at trial was summarized by the Court of Appeals as follows:

> The deceased was shot in bed at night. The only occupants of the room in which the shooting occurred were the deceased and [applicant].

The defense theory was that [applicant] and the deceased were lying in bed with a pillow barrier between them when [applicant] saw the deceased's elbow point upward. When she reached to touch it, the gun went off. [Applicant] made a taped statement about the shooting, and the tape was admitted into evidence. Witnesses to the [applicant's] statements recalled that [applicant] indicated that she had used her left hand to reach toward the deceased. The State, however, introduced a crime lab supervisor's analysis of [applicant's] nightgown showing traces of lead or gunshot residue on the lower right sleeve. That witness, Steve Robertson, conducted tests with the gun found at the scene and opined that the residue was consistent with someone firing that gun.

Estella Mauricio, who was dispatched to the Mowbray residence just after the shooting, testified that she found the deceased, still alive and shot through the head, lying on his left side and covered all the way up to his shoulder. The bullet had entered the right side of his head, exited to the left, and wounded his left hand, which was under his head with a pillow between his head and left hand. The right hand was lying across his chest under the covers. There was no blood or brain matter on the right hand and she did not ever see his hand being washed at home or at the hospital. Emergency technician Cavazos also recalled that the victim was completely covered, with only the right side of his face and the top of his head showing, when he arrived. Mauricio testified that he was positioned like a sleeping person, and the deceased's first cousin, Scott Mowbray, testified

> that the deceased slept in the position in which he was found.
>
> Dr. Dahm, who conducted the autopsy, stated that if the deceased had shot himself, his right hand would have been covered with blood and brain matter. He found no such blood or brain matter on the deceased's right fingers, hand, or forearm. Dahm testified it would have been impossible for the deceased to have shot himself and the hand to be clean, and concluded that the death was a murder.. . . .

Id., 788 S.W.2d at 662-663.

Additionally, two blood spatter experts testified. Sergeant Dusty Hesskew, of the Austin Police Department testified on behalf of the State and Captain Tom Bevel of the Oklahoma City Police Department testified on behalf of applicant. Generally, blood spatter experts inspect the physical evidence to determine the injuries suffered and their location with respect to the other physical evidence. In the instant case, both experts examined applicant's nightgown for "high velocity impact [blood] staining" which commonly occurs within a short distance from a contact gunshot wound. Hesskew testified that he identified and measured, through "luminol testing," high velocity impact bloodstains on applicant's nightgown, which were invisible to the naked eye. Hesskew concluded the cause of death in the instant case was probably homicide. Bevel testified that his examination of the physical evidence led him to conclude the deceased could have died in the manner in which applicant testified, i.e., suicide.

II.

Pursuant to our order, the habeas judge conducted a hearing on the instant application. At that hearing, a third blood spatter expert, Herbert Leon MacDonell, the director of an independent forensic laboratory in Corning, New York, testified. MacDonell is viewed as the preeminent authority on the science of blood spatters.[1] MacDonell was retained to review the photographs and physical evidence in the instant case by the Cameron County District Attorney's office approximately seven months prior to trial. MacDonell's examination of applicant's nightgown revealed no blood stains either visible to the naked eye or under a microscope. MacDonell concluded: "[I]t is very unlikely that [applicant's nightgown] was in close proximity to the victim's gunshot wound at the time of his shooting, or it was protected from spatter in some manner if [it] were." After reviewing the crime scene, the physical evidence and the photographs, MacDonell's expert opinion was that *it was more probable than not that the deceased died from a suicide rather than a homicide*. At the request of the State, MacDonell prepared and mailed to the Cameron County District Attorney a written report of his findings approximately two weeks before trial.

MacDonell took issue with Hesskew's use of luminol to measure blood spattering. Luminol is a substance which can react with blood that is invisible to the naked

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[1] The State's expert, Dusty Hesskew, studied under MacDonell and testified elsewhere that MacDonell "basically invented" blood spatter analysis. Indeed, during Bevel's cross-examination, the state sought agreement that MacDonell "is THE expert or THE granddaddy of blood spatter."

eye. However, luminol testing is not accepted as a positive test for blood. Luminol testing is merely presumptive because luminol reacts with substances other than blood. In MacDonell's opinion, the luminescence from a luminol reaction cannot be accurately measured. He stated:

> I think it would truly be an exercise to futility. I don't think you can put any reliability on it – I certainly wouldn't – and I've seen luminol sprayed many times. I've never heard of anyone trying to measure it, count it, other than saying there appears to be a dozen or more. . . . You could do it, but the validity of your conclusion would be highly suspect in my opinion.

In MacDonell's view, Hesskew did not understand the chemistry behind luminol testing.[2]

Hesskew testified he was retained by the Cameron County District Attorney's office as a blood spatter expert. He observed applicant's nightgown at the Department of Public Safety laboratory prior to the time it was shown to MacDonell. Hesskew was present when the nightgown was treated with luminol. He counted forty-eight small stain areas around the stomach and chest of the nightgown which appeared consistent with high-velocity stains. Hesskew further donned a similar nightgown and fired test shots into a CPR dummy's head filled

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[2] MacDonell further testified:

It's uncomfortable to criticize other people who are practicing in the field that I have been quite responsible for bringing to the front of the current investigative systems in the United States, if not the world, but I must say in one word that I'm disappointed. I will leave it at that.

with blood in an attempt to duplicate the staining he observed through the luminol testing. Although Hesskew could not remember how he was able to duplicate the blood staining, in his expert opinion, applicant, wearing her nightgown, could not have been laying beside her husband at the time of his death. Thus, Hesskew's testimony contradicted applicant's defensive theory.

Hesskew admitted that his testimony at trial included several assumptions which involved more than his own test results. Most important of these assumptions was that *someone tested the invisible stains and determined them to be human blood.* At the hearing on the instant habeas application, Hesskew conceded his trial testimony was *scientifically invalid* because no such confirmation was ever made. In other words, Hesskew conceded that his ultimate opinion that the victim died as a result of a homicide, and that applicant's statements were impossible, had *no* scientific basis.

Bevel testified that it is impossible to measure high velocity impact blood spatter in the manner utilized by Hesskew. Bevel, like Hesskew, only performed *presumptive* tests on applicant's nightgown. Bevel did not conduct any confirmation tests because Hesskew informed him that the Department of Public Safety laboratory confirmed human blood on applicant's nightgown. Because his trial testimony was based upon this erroneous premise, Bevel stated: "with the inability to determine that . . . is blood that is there, especially since we are talking about blood that is only invisible to the unaided eye, I don't think you can really say anything." Bevel believed the failure to conduct confirmation tests undermined his examination and earlier testimony, and agreed

with Hesskew that their trial testimony was *scientifically invalid*.

Steve Robertson, a chemist in the Texas Department of Public Safety (DPS) crime laboratory, testified that he examined applicant's nightgown and was present on three different occasions when the nightgown was sprayed with luminol. The nightgown was also sprayed with three chemicals to determine the presence of lead residue and treated with heat and chemicals to determine the presence of gunshot residue. His examination of the nightgown revealed very small red stains, visible to the naked eye, lead residue and a yellowish stain. Robertson conducted two confirmatory tests on the red stains to determine if they were human blood. *Both tests resulted in negative results*. Robertson testified that, if the stains were blood, the tests for the gunshot residue could have destroyed the protein in the blood and would cause a negative reaction. Further, the chemicals sprayed on the nightgown could have diffused or dissolved the red stains to the extent they were undetectable without a microscope.

Ed Cyganiewicz, the lead prosecutor at trial, conceded that the State's case "depended upon" the blood spatter evidence. Cyganiewicz testified that MacDonell was retained by the Cameron County District Attorney's office as an expert for the State and a subpoena was issued to secure his testimony. According to Cyganiewicz, the State did not call MacDonell to testify because of the expense of securing this testimony. However, because of the possibility of MacDonell's report being "*Brady* material," a copy was forwarded to applicant's trial attorney ten days to two weeks prior to trial.

Abel Toscano, a board certified criminal law specialist, had been a criminal defense attorney in Cameron County for forty-two years and was retained to represent applicant at trial. Toscano received a copy of MacDonell's report shortly before trial after the trial judge threatened Cyganiewicz with sanctions. After discussing the matter with co-counsel and Bevel, and reviewing MacDonell's report, the evidence he had gathered independently, including the statements and information he obtained from applicant, Toscano chose not to contact MacDonell because he (Toscano) did not know how MacDonell would respond and there was some chance MacDonell might change his opinion. However, Toscano did make notations in preparation of a cross-examination of MacDonell, and during trial had his assistants checking to see if MacDonell had arrived.

III.

Following the hearing the habeas judge entered findings of fact and conclusions of law. The habeas judge determined that applicant was not factually innocent under *Holmes v. Third Court of Appeals*, 885 S.W.2d 389 (Tex.Cr.App. 1994); that, although the State's expert's testimony was scientifically invalid, it was not perjurious; and, that applicant's trial counsel was not ineffective. Nevertheless, the habeas judge determined that applicant was denied due process. Among the habeas judge's findings of fact are:

> 7. There was rationale for both murder and suicide. . . .

8. The rationale for suicide was, at least, *equally persuasive*. . . . The decedent had attempted suicide at least twice prior to his death and had shot himself in one of these previous efforts. Decedent had vowed to kill himself . . . .[3]

11. The linchpin of the State's case was the high velocity impact spatter (HVIS) alleged found on the front of her gown. If there, [applicant] could not have been prone in the bed at the time the shot was fired, and it followed her version of events was false.

13. At [the habeas hearing] Hesskew *recanted* his trial testimony as to HVIS. Hesskew admitted his testimony at trial was without *"scientific validity."*

15. . . . *Bevel, too, disavowed his trial testimony.*

16. Without Hesskew's testimony, and the conclusion he drew, there was another equally reasonable hypothesis other than Applicants guilt: Mowbray's death was suicide or an accident. However, the matter does not rest here. The facts relating to Herbert Leon MacDonell now loom large.

17. The State's conduct in connection with MacDonell was, at best, questionable trial strategy, and, at worst, intentional deception of Applicant's counsel.

20. . . . On [MacDonell's] laboratory work sheet, dated November 18, when the State's counsel were in Corning, MacDonell made the entry:

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[3] All emphasis is supplied unless otherwise indicated.

> "Night gown has no pattern of high velocity impact spatter"
>
> On a billing submitted to the State by MacDonell there is a charge of $500.00 for "18 Nov 87 Conference in Corning, New York, to examine *and discuss* certain physical evidence." There seems to be no question that on November 18, 1987, seven months before trial, the State's [counsel] knew MacDonell's findings and that they were exculpatory. [Emphasis in original.]

28. This Court heard and observed MacDonell as well as Hesskew and Bevel. *MacDonell was far and away the more articulate, knowledgeable, and credible.* If the jury had heard MacDonell, and Hesskew had testified as he now does, or not testified at all, *there is a substantial probability a verdict of Not Guilty would have ensued.*

Under these facts, the habeas judge determined the State violated applicant's due process right to a fair trial by suppressing evidence favorable to applicant. Indeed, the habeas judge concluded:

> Applicant's counsel were not ineffective. They vigorously defended their client in a wholly professional manner. However, *their effectiveness was, in large measure, thwarted by the conduct of the State.* . . . Undoubtedly, if [Applicant's] counsel had insisted that the State produce its subpoenaed witness MacDonell, and had examined him, *a different verdict might have resulted.* But Applicant's counsel could not have known the devastating testimony MacDonell would have given (and did give at the writ hearing). They knew nothing more than what

MacDonell had said in his written report of May 13.

> On the other hand State's counsel early on recognized the potential lethal effect of MacDonell's testimony on their theory of the case, and beginning in November and continuing until May *they engaged in a deliberate course of conduct to keep MacDonell's findings and opinions from Applicant's counsel until the last days before trial. Even then they caused Applicant's counsel to believe MacDonell would be a witness and available for cross-examination.*
>
> The State had an obligation to be forthcoming when the Brady motion was heard and granted in March. Instead, *it chose to suppress MacDonell's exculpatory evidence until its hand was forced by the trial judge only days before trial, and, in so doing, the State denied Applicant due process.*

Thus, the habeas judge recommends that we set aside applicant's conviction and order a new trial.

IV.

Virtually every fact finding involves a credibility determination. We have repeatedly recognized that the fact finder is the exclusive judge of the credibility of the witnesses. *See e.g., Dubose v. State,* 915 S.W.2d 493 (Tex.Cr.App. 1996); *Joseph v. State,* 897 S.W.2d 374 (Tex.Cr.App. 1995); *Muniz v. State,* 851 S.W.2d 238 (Tex.Cr.App. 1993); *Bonham v. State,* 680 S.W.2d 815, 819 (Tex.Cr.App. 1984); *Mills v. State,* 508 S.W.2d 826 (Tex.Cr.App. 1974); *Esquivel v. State,* 506 S.W.2d 613 (Tex.Cr.App. 1974); *and, West v. State,* 489 S.W.2d 597

(Tex.Cr.App. 1973). In habeas hearings, the judge determines the credibility of the witnesses and if the habeas judge's findings of fact are supported by the record, they should be accepted by this Court. *Ex parte Turner*, 545 S.W.2d 470, 473 (Tex.Cr.App. 1977). *See also, Ex parte Adams*, 768 S.W.2d 281, 288 (Tex.Cr.App. 1989).

In *Ex parte Moore*, 126 S.W.2d 27 (1939), we stated:

> . . . Where the ruling of the trial judge depends upon the existence or non-existence of a certain fact and testimony pro and con is introduced thereon and the evidence is conflicting it becomes the duty of the trial judge to determine the issue, *and unless it appears to this court that his finding was without support in the evidence*, and that he had committed an error in his judgment thereon, *we would not interfere with his findings thereon. Glenn v. State*, 89 Tex.Cr.R. 13, 229 S.W. 521.

Id., 126 S.W.2d at 28.

The State has an affirmative duty to disclose favorable evidence under the Due Process Clause. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197 (1963). However, in order to warrant a new trial, the favorable evidence must also be material. *Ex parte Castellano*, 863 S.W.2d 476, 485 (Tex.Cr.App. 1993).[4]

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[4] In *Thomas v. State*, 841 S.W.2d 399, 404 (Tex.Cr.App. 1992), we held:

> . . . [T]he Due Process Clause of the Fourteenth Amendment is violated when a prosecutor fails to disclose evidence which is favorable to the accused that creates a probability sufficient to undermine the confidence in the outcome of the proceeding.

In the instant case, the habeas judge determined the State knowingly suppressed MacDonell's report which supported applicant's theory of suicide. This was obviously favorable evidence. Additionally, the habeas judge found that if the favorable evidence had been considered by the jury, an acquittal would have resulted. Clearly this finding meets the materiality requirement. *Id.*, 863 S.W.2d at 486.

The habeas judge's factual determinations are supported by the record and, therefore, will be accepted by this Court. *Turner*, 545 S.W.2d at 473. Consequently, we hold applicant's due process rights were violated, and applicant is entitled to relief. Accordingly, applicant's conviction is set aside and it is the order of this Court that applicant be returned to the Sheriff of Cameron County to answer the indictment.

WHITE, J., not participating.

Ex parte Mowbray, ___ S.W.2d ___ (Tex.Crim.App. 1996) (McCormick, P.J., dissenting).

EX PARTE FREDA S. MOWBRAY A/K/A SUSIE MOWBRAY

No. 72,624

Court of Criminal Appeals of Texas

December 18, 1996

DISSENTING OPINION

McCORMICK, Presiding Judge, dissenting.

I must respectfully dissent. In this case, the majority grants relief on this eight-year-old conviction by holding applicant's due process rights under the Fourteenth Amendment to the United States Constitution were violated when the State "suppressed" MacDonnell's [sic] report by furnishing it to applicant about two weeks before her 1988 trial began! Just to state the Court's holding is to refute it. The Court's holding as to this aspect of the case[1] is absurd and represents another inane exercise in judicial activism – i.e., finding so called "rights" in the United States Constitution that just do not exist.

I cannot add much more to Judge Keller's dissenting opinion which I also join. MacDonnell's [sic] report does not in any way impeach the most important evidence in this case establishing applicant's guilt – the absence of

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[1] The Court's opinion fails to address the issues of cognizability and procedural default. Since this proceeding is a collateral attack on applicant's conviction approximately eight years after the fact, these are important issues which deserve serious consideration.

blood and brain matter on the victim's right hand, the position of the victim's body, and the presence of gunshot residue on the right sleeve of applicant's nightgown all of which were inconsistent with her defensive theory. *See Mowbray v. State*, 788 S.W.2d 658, 663 (Tex. App. – Corpus Christi 1990, pet ref'd), *cert. denied*, 111 S.Ct. 999 (1991). The evidence at applicant's 1988 trial amply supports a finding that applicant shot and killed the victim while he was asleep in bed, and MacDonnell's [sic] report fails to cast any serious doubt as to the reliability of this finding. I would hold applicant fails to present any cognizable claim for habeas corpus relief. *Cf. Herrera v. Collins*, 506 U.S. ___, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

In addition, the basis of applicant's claims for relief in this proceeding has been known to applicant since about two weeks before her 1988 trial. However, she failed to raise these claims at the motion for new trial hearing following her 1988 conviction or during the direct appeal of her 1988 conviction. *See Mowbray*, 788 S.W.2d at 662-72, 669 (applicant filed motion for new trial claiming the State failed to produce the T-shirt the victim wore when shot).[2] Applicant has delayed approximately seven years before bringing her claims for relief in this proceeding. Under these circumstances, the State's and society's legitimate and valid interest in the finality of

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[2] One need only examine the Court of Appeals opinion affirming applicant's 1988 conviction to see that her conviction more than satisfies due process principles. *See Mowbray*, 788 S.W.2d at 662-72.

this obviously guilty applicant's conviction should outweigh granting applicant relief on any due process violation that allegedly occurred in connection with her 1988 trial. Someone should be asking whether the State can get a fair trial after such a long passage of time, and whether applicant's delay in asserting her claims for relief in this proceeding constitutes a waiver of those claims.

I respectfully dissent.

MANSFIELD and KELLER, JJ., join.

Ex parte Mowbray, ___ S.W.2d ___ (Tex.Crim.App. 1996) (Keller, J., dissenting).

EX PARTE FREDA S. MOWBRAY A/K/A SUSIE MOWBRAY

No. 72,624

Court of Criminal Appeals of Texas

December 18, 1996

DISSENTING OPINION

KELLER, Judge, dissenting.

Applicant makes three claims in her effort to gain relief from her conviction. The trial court found that applicant was not entitled to relief on the basis of any of her three claims, but recommended relief anyway, determining that the State's suppression of favorable evidence denied applicant due process.

The majority's decision that applicant's conviction should be set aside rests upon the determination by the trial court that the State knowingly suppressed MacDonnell's [sic] report, and that if the jury had considered the report, there is a substantial probability applicant would have been acquitted.[1]

The record does not support the finding of the trial court that the State engaged in a deliberate course of conduct to keep MacDonnell's [sic] findings and opinions from defense counsel until the last days before trial. The prosecutor wrote twice to MacDonnell [sic] – in March

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[1] The majority's statement that the trial court found that "an acquittal would have resulted" is inaccurate. Slip op. at p. 9.

and in April – to request him to forward his written findings. No report was sent. The report in question was not prepared by MacDonnell [sic] until May 13, 1988. The State then turned the report over to the defense immediately, ten days before the trial began on May 23, 1988.

Neither does the record support the finding that the State misled defense counsel by representing that it would produce MacDonnell [sic] at trial. Although the State retained MacDonnell [sic] and issued a subpoena for him, this was not shown to be a subterfuge to mislead counsel: the State did not get the final report until May of 1988 either.

But even if the record did support the trial court's finding that the State suppressed the report,[2] applicant would not be entitled to relief. Her attorney did know of the report before trial; he and his client made a tactical decision not to follow up on the report.

The full reasons for this decision are unknown to us for the sole reason that Applicant would not allow trial counsel to testify to all the reasons he decided not to use MacDonnell [sic] or the report.[3] Regarding the reasons Toscano did not use the report or MacDonnell [sic], Toscano stated:

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[2] Ordinarily, a due process claim relating to the suppression of favorable evidence does not apply where the defense obtained the evidence before trial. *Havard v. State*, 800 S.W.2d 195, 204-205 (Tex.Crim.App. 1989) (opinion on original submission).

[3] Apparently, no one recognized that applicant had waived the attorney/client privilege when she alleged ineffective assistance of counsel. Toscano should have been allowed to testify as to the reasons for his decision regarding MacDonnell [sic].

> There were a number of other factors. And if the Court will allow me to do so by – I would have to reveal some confidential information that I don't think is proper unless the Court orders me . . . I feel that I should be released of this confidentiality so as to bring forth before this tribunal the facts that we – that we – that you should know, what the bases were why I did not call Mr. – call or talk to him.

(Ellipses added.) The trial court responded that applicant had to waive the privilege. Applicant consulted with her attorney off the record, with the result that the privilege was not waived. Because applicant purposely kept from the trial court the full reasons that she and her attorney decided not to use the report or MacDonnell [sic], we must assume that the decision was sound and that the defense did not consider the report to be favorable.[4] And if we make that assumption, there is no basis for concluding that the "suppression" of the report denied applicant due process or, indeed, had any deleterious effect on the trial at all.

MacDonnell's [sic] report was not the only matter in dispute at the writ hearing. Testimony at the hearing established that witnesses erroneously believed that a confirmatory test had been done on the nightgown after presumptive tests indicated the presence of blood. In fact,

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[4] At least one of MacDonnell's [sic] conclusions contradicted applicant's statement to the police and her defensive theory: MacDonnell [sic] concluded that it was unlikely that the gown was near the wound at the time of the fatal blast. Applicant had admitted, however, that she was wearing the gown and was close to the victim.

confirmatory tests had been done with negative results. The negative results did not necessarily indicate a lack of blood, but established only that if there was blood, the amount was too small to react or it had been degraded by previous forensic tests.[5]

Importantly, Hesskew's testimony that there was high velocity impact spatter was entirely unaffected by the fact that there was no positive confirmation that the substance on the gown was blood. That is, the pattern of the stain was caused by the atomization of the substance – whatever it was – produced when the surface tension of the substance was overcome by very high energy from, for example, a gunshot. There was testimony that high velocity impact spatter is associated ninety-nine times out of one hundred with gunshots, known otherwise to occur in traffic fatalities when a car was traveling at a high rate of speed. The victim's death was caused by a high energy contact gunshot to the head.

Testing with luminol, with which the presumptive test was done, is relatively specific. That is, there is a limited number of substances with which it will react. There was testimony that luminol will react to blood, copper, iron, nickel, and bleach. There was also testimony that had the stain on the nightgown been a bleach stain it would not have been likely to produce the pattern that was on the gown.

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[5] There was, in fact, a considerable amount of testimony that luminol tests and tests for gunshot residue could degrade the sample to the extent that it would not be possible to get a positive confirmation of the presence of blood.

The trial court's finding that Hesskew recanted his trial testimony as to HVIS is thus unsupported by the record except to the extent that Hesskew believed a confirmatory test for the nature of the substance on the gown had indicated blood. Likewise, the record does not support the finding that Hesskew disavowed virtually the whole of his trial testimony. Ultimately, the opinions he expressed at trial varied from his opinions at the writ hearing only in that he conceded that he did not prove to a scientific certainty that there was blood on the nightgown.

There was testimony at trial and at the writ hearing that red stains were observed on the nightgown, both microscopically and with the naked eye. There was evidence that the victim was found in his normal sleeping position, with his left hand under his head and a pillow between his knees, and that such a position would not be usual for a man who wished to commit suicide. There was no blood and brain matter on the victim's hand, as there should have been if he had held the gun.[6] There was testimony that the pattern of the stain on the nightgown was caused by high velocity impact spatter.

The trial court concluded that applicant failed to prove her claims of "actual innocence," ineffective assistance of counsel, or perjured testimony. These findings

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[6] The trial court found that the absence of blood and brain matter was a wash because there was no blood and brain matter on applicant's arm either. The finding that the absence of such matter was a wash is unsupported by the record; there was testimony that applicant's arm could have been shielded by something like a towel.

are supported by the record. The court's finding that HVIS was the linchpin of the State's case is not supported by the record. Even conceding that it was important, doubt was cast upon only one aspect of the HVIS testimony. Something produced a stain on the gown in a pattern that is associated almost exclusively with gunshots. Under the circumstances of this case, the lack of scientific certainty as to what that substance was is not sufficient to establish a denial of due process.

Believing that applicant has failed to establish a right to relief under any of her claims or under due process, I would deny relief.

MANSFIELD, J., joins.

NO. 28,669-1

IN THE COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

CAUSE NO. 87-CR-1135-A

EX PARTE	IN THE DISTRICT COURT
FREDA S. MOWBRAY, A/K/A	CAMERON COUNTY, TEXAS
SUSIE MOWBRAY	107TH JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this cause on June 28, 1995, the Court of Criminal Appeals in a per curiam order directed that the trial court order necessary affidavits or hold hearings and make findings of fact and conclusions of law upon three allegations that Applicant has made in her Application for Writ:

1. The Applicant is "actually innocent" under the standard of State Ex Rel Holmes v. Third Court of Appeals, 885 S.W.2d 389 (Tex Crim App 1994);

2. The State knowingly presented perjured testimony; and

3. Trial counsel was ineffective in failing to investigate the original findings of the State's expert which would have supported the defense theory in the case.

This Judge reviewed the record[1], and on August 22, 1995, conducted a hearing at which the State and the accused offered evidence. Based upon a study of the record and the evidence offered at the evidentiary hearing the Court makes the following findings and conclusions:

FINDINGS OF FACT

1. In June 1988 the Jury convicted the Applicant, Fredda S. Mowbray, a/k/a Susie Mowbray of the murder of her husband, William A. Mowbray. The Jury assessed punishment at life imprisonment.

2. Applicant's conviction was affirmed in 1990 by the Thirteenth Court of Appeals, Mowbray v. State, 788 SW2d 658 (Tex. App.-Corpus Christi, 1990, pet. ref.)

3. The State's case was based on circumstantial evidence except for a taped interview of the Applicant by the investigating officers placed in evidence by the State. The tape was largely exculpatory and supported Applicant's version of the shooting.

4. The decedent died of a single massive close range wound to the right temple as the he (sic) lay in bed with his wife.

5. The State's theory was that Appellant (sic) shot her husband while kneeling on the bed or standing by

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[1] I suffer the disadvantage of not hearing and observing the witnesses at trial and must rely on the record. The trial judge in this case was Gilberto Hinojosa who has since left the bench and is County Judge of Cameron County. The present Presiding Judge of the 107th District, Benjamin Euresti, Jr., was District Attorney at trial and prosecuted this case.

the bed, holding the gun in close range or contact with his right temple.

6. The Defense theory was that recounted by the Applicant in the taped interview: her husband's death was suicide or an accidental discharge of the pistol at the moment when, awakened by his movement next to her, she, still prone in bed, reached up and touched his elbow and the pistol discharged. Her position in, on or beside the bed when the gun was fired was critical to both the State's and Applicant's case.

7. There was rationale for both murder and suicide. The State theorized the husband was murdered for life insurance proceeds offering evidence that Applicant had asked the status of his life insurance some weeks before the shooting.

8. The rationale for suicide was, at least, equally persuasive. The decedent owned a General Motors automobile dealership that almost certainly would have soon failed. Decedent had been "double floor planning" his automobiles with different banks, the revelation of which would in all probability result in his criminal prosecution. The Internal Revenue Service days before had taken the last formal step prior to referring the matter to the Department of Justice for prosecution of the decedent for tax evasion. Every effort to secure additional financing for the dealership failed. Decedent's friend and the general manager of the dealership had resigned and was moving to another city within two or three days. The decedent had attempted suicide at least twice prior to his death and had shot himself in one of these previous efforts. Decedent had vowed to kill himself rather than face jail for tax evasion or commercial fraud.

9. The Jury was apparently convinced by the State's view of the physical evidence to which the State

devoted much of its closing arguments[1]: (1) There was no blood or brain matter on the decedent's hand as there should have been had he fired the fatal shot; and (2) There was on the front of Applicant's night gown a pattern of high velocity impact spatter (HVIS) that disproved her claim that she was prone in the bed, and instead was either kneeling on the bed or leaning over the side of it at the time the fatal wound was inflicted.

10. Actually the absence of blood and brain matter was a wash. If a suicide or accident, blood and brain matter should have been on decedent's hand that held the firearm; there was none at autopsy[2]. Equally true, as the State's pathologist testified, had Appellant (sic) been holding the firearm, large amounts of blood and brain matter should have been on the sleeve of her night gown. There was none.

11. The linchpin of the State's case was the high velocity impact spatter (HVIS) allegedly found on the front of her gown. If there, she could not have been prone in the bed at the time the shot was fired, and it followed her version of events was false.

12. The State's evidence as to HVIS on Appellant's (sic) gown came from the State's expert witness, Dusty Hesskew, an Austin detective. He testified as to finding a pattern of HVIS on the gown that he was able to replicate kneeling on a bed and firing into a dummy (S.F. 944). Based on this finding he testified in his opinion the deceased did not commit suicide. He avoided saying it was murder (S.F. 948). In a post

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[1] Applicant sets out the State's arguments at pages 7-10 of her proposed findings and conclusions.

[2] No one seemed to recall with certainty whether they had seen the condition of the hand prior to the autopsy.

trial deposition he seemed to change his opinion to murder or accident (Writ 333-334).

13. At our August evidentiary hearing Hesskew recanted his trial testimony as to HVIS. Hesskew admitted his testimony at trial was without "scientific validity" (Writ 134).

14. Saying that the test he conducted for HVIS was presumptive and required that there be a prior confirmatory test for blood, and now learning there had been no confirmatory test,[1] Hesskew disavowed virtually the whole of his trial testimony (Writ 120-128).

15. The Defendant's expert, Tom Bevel, confirmed that the validity of his testimony at trial had been based upon Mr. Hesskew's assurance to him on two occasions that the spatter on the gown had been confirmed as blood, statements that Hesskew now denies. Bevel, too, disavowed his trial testimony (Writ 139, 152).

16. Without Hesskew's testimony, and the conclusions he drew, there was an other equally reasonable hypothesis other than the Applicants (sic) guilt: Mowbray's death was suicide or an accident. However, the matter does not rest here. The facts relating to Herbert Leon MacDonell now loom large.

17. The State's conduct in connection with MacDonell was, at best, questionable trial strategy, and, at worst, intentional deception of Applicant's counsel.

18. Herbert Leon MacDonell of Corning, New York is a preeminent authority in the science of blood stains and their significance. No one in our case disagreed with this assessment of him. Hesskew, testified that

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[1] DPS Chemist Robertson testified that he had tested the stains for blood and the test was negative (Writ 240)

MacDonell was the "father" of the HVIS test (Writ 229)[1]. Both Hesskew and Defendant's expert, Bevel, had studied under MacDonell at his Corning institute. There seemed to be little question that Hesskew and Bevel would readily accede to MacDonell's opinions. Indeed, Hesskew did just that at the evidentiary hearing.

19. On November 18, 1987, following the August shooting and seven months before trial, District Attorney Euresti and Assistant District Attorney Cyganiewicz went to Corning, New York, and employed MacDonell as a State's expert.

20. In Corning the prosecutors furnished MacDonell with photographs and the white night gown worn by Appellant (sic) at the time of the shooting. Shortly afterwards MacDonell came to Brownsville

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[1] At trial Hesskew was asked:

Q: Who is Herb MacDonald (sic)?

A: Herb MacDonald (sic) is basically what we call the inventor of bloodstain analysis. He began the study in 1977 under a federal grant from the Washington Bureau of Justice.

Q: Is it true that Mr. MacDonald (sic) is the only one who has written a thesis on blood spatter? Did he have anything to do with that?

A: Yes, sir.

Q: Is he recognized as "the" expert in the world, even?

A: Yes, sir. He teaches school all over the world, in Australia, Japan, German (sic). He has a fellowship, I believe from Scotland Yard.

Q: An (sic) that's who you trained under in Corning?

A: Yes, sir, that's correct. (S.F. 921-922)

and viewed all the physical evidence. On his laboratory work sheet, dated November 18, when the State's counsel were in Corning, MacDonell made the entry:

"Night gown has no pattern of high velocity impact spatter" (Writ 248).

21. A *Brady* motion was filed February 1, 1988, and heard at pretrial, March 1, 1988. At that hearing Assistant District Attorney Cyganiewicz said:

> "Of course, everything that is exculpatory has to be turned over, and we will." and in answer to the Court's question as to exculpatory material he said:
>
> > Yes, sir. We've already given the statement by the defendant which may very well be exculpatory. Anything else, he's entitled to exculpatory materials and I'll sift through the file and obtain those files (sic), Your Honor.

22. Even as he spoke Cyganiewicz knew MacDonell's conclusions and the lab work sheet entries. He surely knew little could be more exculpatory in view of the State's theory of the case. At the pretrial Cyganiewicz made no disclosure of MacDonell's findings and his lab work sheet. The parties agreed on the record that all such disclosures would be made prior to or on March 11.

23. The State made no disclosures of MacDonell and his findings by the March 11 deadline. It was only after Appellant's (sic) counsel confronted State's counsel in the chambers of the trial judge some twelve days before trial, with the judge threatening the State with sanctions, that the State agreed to furnish MacDonell's written report. It was eight to ten days

before trial when the State actually furnished Applicant such report[1]. The State continued to represent that it would be calling MacDonell as a witness.

24. The length to which the State went to withhold from defense counsel the substance of McDonell's (sic) exculpatory testimony may be found at pages 209-210 of the Writ transcript. At one point the State's counsel told the judge " . . . it is hard to get in touch with (MacDonell)", a representation made questionable by the fact the State days later was able to produce a written report from MacDonell.

25. Abel Toscano, lead counsel for Appellant (sic), believed, even after the trial began, that MacDonell would be present and testify. In this Court's view he was entitled to rely on the State's subpoena for MacDonell for such a conclusion. Needless to say the State did not call MacDonell and he apparently remained in Corning.

26. Toscano testified he made no effort to contact MacDonell because he was an employed expert of the State and under local custom he, Toscano, would have to secure the State's permission to talk to him. It was, he said, the local practice not to try to interview the opponents (sic) employed experts.

27. Toscano did not recognize MacDonell's outstanding credentials nor the unquestionable impact and import of MacDonell's opinion. Toscano had employed Oklahoma City Police Captain Bevel as his expert. He was of the mistaken opinion that Bevel's testimony would be sufficient to refute Hesskew. The late hour at which the State finally

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[1] MacDonell's written report will be found in Writ Vol. II pp. 260-261.

produced MacDonell's report undoubtedly contributed to Toscano's making this mistaken judgment call.

28. This Court heard and observed MacConnel (sic) as well as Haskew (sic) and Bevel. MacConnel (sic) was far and away the more articulate, knowledgable (sic) and credible. If the jury had heard MacDonell, and Hesskew had testified as he now does, or not testified at all, there is a substantial probability a verdict of Not Guilty would have ensued.

29. The Court finds as true, and without setting them out here, adopts Applicant's proposed findings of fact numbers 6, 11, 12, 13, 14, 17, 19, 36, 38, 51, 55, 56, 66, 76, 77, 78, 79 and 81).

CONCLUSIONS OF LAW

1.

"ACTUAL INNOCENCE"

In this case the "newly discovered evidence" was a newly discovered absence of evidence. All Hesskew's and Bevel's opinions were valid only if there had been a prior confirmation of blood before their presumptive tests. Unknown to everyone, with the exception of DPS Chemist Robertson, there had been no such confirmation.

Such "newly discovered evidence" meets Judge Maloney's threshold standard in *Ex Parte Graham*, 853 SW2d 565, 567: The newly discovered evidence created a doubt as to the efficacy of the verdict to the extent that it undermined confidence in the verdict, and it is probable that the verdict would be different.

However, the facts developed in these proceedings fall short of the *Holmes* and *Herrera* standard, i.e. based on the proferred newly discovered evidence and the entire record before the jury that convicted him no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

2.

PERJURED TESTIMONY

The Court finds no perjury, making a distinction between perjured testimony and testimony false because it was unknowingly based on false assumptions. If perjury is a false statement knowingly made with intent to deceive, and with knowledge of the statements (sic) meaning, and it is, neither Hesskew nor Bevel committed perjury.

Hesskew's and Bevel's stated opinions that the microscopic stainings on the gown were high velocity impact spatters and the "reconstruction" of the crime based on that belief were without scientific validity, but not perjury.

It follows it [sic] that the State did not knowingly offered (sic) perjured, or even false, testimony, unless it can be said that the collective knowledge of the score or more State's investigators and experts, including DPS Chemist Robertson, is to be imputed to the State's attorneys.

3.

INEFFECTIVE COUNSEL

Applicant's counsel were not ineffective. They vigorously defended their client in a wholly professional manner. However, their effectiveness was, in large measure, thwarted by the conduct of the State.

Applicant's trial counsel may be faulted in hindsight for mistakes in judgment, but they were not ineffective. Undoubtedly, if Appellant's counsel had insisted that the State produce its subpoenaed witness MacDonell, and had examined him, a different verdict might have resulted. But Applicant's counsel could not have known the devastating testimony MacDonell would have given (and did give at the writ hearing). They knew nothing more than what MacDonell had said in his written report of May 13 (Writ 260-261).

On the other hand State's counsel early on recognized the potential lethal effect of MacDonell's testimony on their theory of the case, and beginning in November and continuing until May they engaged in a deliberate course of conduct to keep MacDonell's findings and opinions from Applicant's counsel until the last days before trial. Even then they caused Applicant's counsel to believe MacDonell would be a witness and available for cross examination (Writ 211-214).

The State had an obligation to be forthcoming when the *Brady* motion was heard and granted in March. Instead, it chose to suppress MacDonell's exculpatory evidence until its hand was forced by the trial judge only days before trial, and, in so doing, the State denied Applicant due process.

Paraphrasing Judge Berschelmann in *Ex parte Brandly*, 781 SW2d 886, 894 (Tex Cr App 1989): The cumulative effect of the State's . . . conduct, judged by the totality of the circumstances resulted in the deprivation of Applicant's right to due process by suppressing evidence favorable to the accused . . .

It is this Court's opinion that fundamental fairness requires Applicant's conviction be set aside and she be granted a new trial.

Signed for entry this 30th day of November, 1995.

/s/ Darrell Hester
Judge Presiding

IN THE

COURT OF CRIMINAL APPEALS OF TEXAS

Ex parte FREDA SUE MOWBRAY
a/k/a SUSIE MOWBRAY NO. 72,624

February 12, 1997

On this day the State's Motion for Rehearing filed by the State Prosecuting Attorney was denied. (PRESIDING JUDGE MCCORMICK & JUDGE KELLER WOULD GRANT)

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IN THE

COURT OF CRIMINAL APPEALS OF TEXAS

Ex parte FREDA SUE MOWBRAY
a/k/a SUSIE MOWBRAY NO. 72,624

February 12, 1997

On this day the State's Motion for Rehearing was denied. (PRESIDING JUDGE MCCORMICK & JUDGE KELLER WOULD GRANT)

CAUSE NO. 87-CR-1135-A

(CAUSE NO. 28,669-1)

EX PARTE	§	IN THE TEXAS COURT
FREDA S. MOWBRAY, A/K/A	§	OF CRIMINAL APPEALS
SUSIE MOWBRAY	§	TRAVIS COUNTY, TEXAS

STATE'S OBJECTIONS TO THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

[EXCERPTS]

TO THE HONORABLE JUDGES OF SAID COURT:

. . . .

In any case, to decide whether there is a *Brady*[4] violation appellate courts examine the record to see whether 1) there was suppression after request; 2) the suppressed material was favorable to the accused; and 3) it was material to his guilt or innocence. *Butler*, 736 S.W.2d at 670; *Withers v. State*, 902 S.W.2d 122, 126 (Tex. App. Hous. [1st Dist.] 1994, no pet.).

Brady's first factor exists where the prosecution actively suppressed, or negligently or inadvertently failed to disclose material, exculpatory evidence that may exonerate the accused, *Butler*, 736 S.W.2d at *Id.*; *Holloway v. State*, 525 S.W.2d 165, 169 (Tex. Crim. App. 1975); *Smith v. State*, 840 S.W.2d 689, 693 (Tex. App. – Ft. Worth 1992, pet. ref'd); (*See* T.S.F. XXIV, P. 9, Lines 8-11; P. 115, Line

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[4] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

18) Consequently, there is no violation in a record showing neither the introduction of specific misleading evidence or nondisclosure of favorable evidence before or during trial, *Donnelly v. DeChristoforo*, 416 U.S. 637, 647; 94 S.Ct. 1864, 40 L.Ed.2d 431 (1974); *Haywood v. State*, 507 S.W.2d 756, 760 (Tex. Crim. App. 1974); *Means v. State*, 429 S.W.2d 490, 495 (Tex. Crim. App. 1968); *Withers*, 902 S.W.2d at 126; *Siegel*, 814 S.W.2d 407-08, where counsel was afforded an opportunity to request a continuance, *Etheridge*, 903 S.W.2d at 20; *Lindley v. State*, 635 S.W.2d 541, 543 (Tex. Crim. App. 1982 [Panel Op.]); *Payne v. State*, 516 S.W.2d 675, 677 (Tex. Crim. App. 1974), proof counsel had, or could have had, the same information through reasonable diligence, *Williams*, 35 F.3d at 163; *Ex parte Ramirez*, 577 S.W.2d 261, 264 (Tex. Crim. App. 1979 [Panel Op.], and/or made a strategic decision about its use. *Zule v. State*, 802 S.W.2d 28. 33 (Tex. App. – Corpus Christi 1990, pet. ref'd).

. . . .

[State's Objections, pp. 6-7. The extended discussion of these points appears at pp. 6-13 of the State's Objections.]

IN THE

COURT OF CRIMINAL APPEALS OF TEXAS

Ex parte FREDA SUE MOWBRAY a/k/a SUSIE MOWBRAY

WRIT NO. 28,669-01

NO. 72,624

THE STATE'S MOTION FOR REHEARING

[EXCERPTS]

TO THE HONORABLE JUDGES OF SAID COURT:

. . . .

GROUND FOR REHEARING NO. TWO

> This Court should rehear this case to address whether Applicant has procedurally defaulted on the delayed disclosure claim by failing to object or otherwise raise the issue at trial, or on direct appeal.

Here, Applicant completely failed to raise any complaints about the late disclosure of MacDonell's report at trial, in her motion for new trial (Transcript, pp. 308-357), on direct appeal, *see, Mowbray v. State*, 788 S.W.2d at 658 – or even in her Application for Writ of *Habeas Corpus*. (Writ Transcript, pp. 1-118) Applicant should not be permitted to remain mute throughout her trial and then be allowed to complain about the allegedly late disclosure of an expert report for the first time in a post-conviction *habeas* proceeding – especially since such a timely complaint would have provided the trial judge an opportunity to cure the problem (*i.e.*, by granting a continuance or otherwise). *See, McGeshick v. Fiedler*, 3 F.3d 1083, 1086 (7th Cir. 1993); *United States v. Devin*, 918 F.2d 280, 291

(1st Cir. 1990) (late disclosure ameliorated by court granting continuance); *United States v. Ramirez*, 810 F.2d 1338, 1343 (5th Cir.), *cert. denied*, 484 U.S. 844, 108 S.Ct. 136 (1987).

[State's motion for rehearing, pp. 3-4.]

. . . .

GROUND FOR REHEARING NO. FOUR

The Court should rehear this case to address whether a delayed disclosure claim is cognizable in a *habeas corpus* proceeding where defense counsel made a conscious tactical decision not to utilize the allegedly exculpatory material after receiving it prior to trial.

There is no constitutional violation where, as here, defense counsel makes a *tactical decision* to proceed to trial aware of the previously undisclosed information. *Zule v. State*, 802 S.W.2d at 33; *United States v. Bishop*, 890 F.2d 212, 218-19 (10th Cir. 1989), *cert. denied*, 493 U.S. 1092, 110 S.Ct. 1164 (1990); *United States v. Warhop*, 732 F.2d 775, 777 (10th Cir. 1984).

[State's motion for rehearing, p. 7.]

. . . .

GROUND FOR REHEARING NO. FIVE

The Court should rehear this case to reconsider its published decision that places the responsibility on the State to call all allegedly exculpatory witnesses on its subpoena list, or risk its conviction being thrown out for prosecutorial and/or *Brady* violations.

The trial court concluded in its findings that the State engaged in a "deliberate" effort to mislead defense counsel to believe that MacDonell would testify at trial by placing MacDonell's name on its subpoena list. The *Brady* rule, however, does not require the prosecution "to conduct a defendant's investigation or to assist in the presentation of the defense's case." *United States v. Bagley*, 473 U.S. at 675, 105 S.Ct. at 3379-80; *United States v. Aubin*, 87 F.3d 141 (5th Cir. 1996); *Palmer v. State*, 902 S.W.2d 561, 563 n.2 (Tex. App. – Houston [1st Dist.] 1995, no pet.). The rule exists to "ensure that a miscarriage of justice does not occur, 'not to displace the adversary system as the primary means by which the truth is uncovered.' " *Bagley*, 473 U.S. at 675, 105 S.Ct. at 3379-80. Accordingly, the Court may not properly lay blame on the prosecution for Applicant's failure to call MacDonell as a witness at trial. The State had the right to subpoena MacDonell as a stand-by witness, and further had the absolute right to ultimately choose not to call him to testify.

[State's motion for rehearing, pp. 9-10.]

. . . .

GROUND FOR REHEARING NO. SIX

Should this Court believe that there are instances in which a delayed disclosure claim may be cognizable in a *habeas corpus* proceeding, this Court should rehear this case to determine whether the trial court's finding that Applicant was prejudiced by the alleged delay is supported by the record. No evidence was presented that 10 days was an insufficient time for the defense to subpoena MacDonell to trial after receiving his report. Nor was there any evidence

> that defense counsel would have called MacDonell to testify as a defense witness had he known of the prosecutors' plan not to call him as a State's witness.

Although the United States Supreme Court has not yet specifically ruled whether a delayed disclosure claim can violate the *Brady* rule, some of the federal circuits have nonetheless concluded that it can under limited circumstances. Those appellate courts determine only whether the defendant suffered any prejudice as a result of the prosecution's tardy disclosure. *United States v. Neal*, 27 F.3d 1035, 1050 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1165 (1995); *United States v. Devin*, 918 F.2d at 289. If the defendant received the material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early as it should have been. *United States v. Stephens*, 964 F.2d 424, 436 (5th Cir. 1992); *United States v. McKinney*, 758 F.2d 1036, 1049-50 (5th Cir. 1985).

. . . .

[State's motion for rehearing, p. 11. The extended discussion of these points appears at pp. 3-12 of the motion for rehearing.]